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In the

SUPREME COURT OF THE UNITED STATES

(OCTOBER TERM, 1959)

No. 594

RAY J. HUGHES,
Appellant,

VERSUS

THE STATE OF OKLAHOMA,
Appellee.

JURISDICTIONAL STATEMENT

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December, 1959.

UTTERBACK TYPESETTING CO., 13 SO. WALKER, OKLAHOMA CITY. PH. CE 5-8780

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APPENDIX

Exhibit A:

Syllabus, Court of Criminal Appeals of the State of Oklahoma, Ray J. Hughes v. The State of Oklahoma, No. A-12,696, filed in the Court of Criminal Appeals, May 13, 1959 i

Exhibit B:

Petition for Rehearing and for an Extension of Time Within Which to Supplement and Brief, A-12,696, Ray J. Hughes v. The State of Oklahoma ix

Exhibit C:

Application for Leave to File and Petition for Certiorari, A-12,696, Ray J. Hughes v. State of Oklahoma xii

Exhibit D:

Order Denying Petition for Certiorari, A-12,696, Ray J. Hughes v. State of Oklahoma, Filed in the Court of Criminal Appeals of the State of Oklahoma, Oct. 20, 1959 xvii

In the

Supreme Court of the United States

(October Term, 1959)

No. .....

Ray J. Hughes,
Appellant,

versus

The State of Oklahoma,
Appellee.

JURISDICTIONAL STATEMENT

A.

Appellant appeals the Opinion of the Court of Criminal Appeals of the State of Oklahoma hereto appended, marked "Exhibit A"; and recited therein is the record upon which he relies (Tr. 45-52, App. i-ix). No copy of the judgment of the trial court there affirmed was ever filed with the Clerk of the Court, and (off the record) apparently none was ever entered in the trial court.

B.

Appellant prosecutes this appeal insisting that the State of Oklahoma will, unless prevented by this Court, under the judgment appealed from deprive him of his liberty without due process of law, in violation of the

Constitution of the United States, and particularly the 5th and 14th Amendments thereof.

(I) Appellant was tried to a jury in the District Court of Canadian County, Oklahoma, upon a charge of larceny of domestic animals, which trial resulted in a verdict of guilty with a recommendation that the punishment be suspended. The statute upon which the prosecution was based (as more fully appears from the instructions of the court at page 28 of the Transcript) is O.S.A., Title 21, Sec. 1716, and is as follows:

> "Any person in this State who shall steal any horse, jackass, jennet, mule, cow, or hog, shall be guilty of a felony and upon conviction shall be punished by confinement in the State Penitentiary for a term of not less than three years, nor more than ten years; and any person in this State who shall steal any sheep, or goat, shall be guilty of a felony and upon conviction therefor shall be punished by confinement in the State Penitentiary for a term not less than six months, nor more than three years. The word 'horse' as used in this act, shall include all animals of the equine species and the word 'cow' shall include all animals of bovine species."

(II) The Opinion of the Court of Criminal Appeals was delivered May 13, 1959. A Petition for Rehearing was filed May 25, 1959, hereto appended as "Exhibit B" (Tr. 53-57, App. ix-xi), and denied by the Court July 22, 1959 (Tr. 57). On October 15, 1959, appellant filed his "Application for Leave to File and Petition for Certiorari", a copy of which is appended hereto as "Exhibit C" (App. xii-xvi).

This Petition for Certiorari was denied October 20, 1959; the order denying Petition for Certiorari is interest-

ing. In this connection, a copy is appended hereto, marked "Exhibit D", and the same appears in the Transcript, pages 70-71, App. xvii-xix.

(III) Appellant believes that Sec. 1257 of Title 28, U.S.C.A., confers jurisdiction on this Court of this appeal; and if he be mistaken in that, he requests that this be treated as a petition for certiorari.

(IV) Appellant believes that *Palmer* v. *Ashe*, 72 Sup. Ct. 191; *Townsend* v. *Burke*, 68 Sup. Ct. 1252, 334 U.S. 736, and cases there cited sustain the jurisdiction of this Court.

C.

The question presented by this appeal is: Will the State of Oklahoma, unless prevented by this Court from so doing, under and by virtue of the judgment of the District Court of Canadian County, Oklahoma, as here affirmed by the Court of Criminal Appeals of said State, deprive appellant of his liberty for three years without due process of law, in violation of the Constitution of the United States, and more particularly the 14th Amendment thereof:

OR

Does the conduct of the Trial Judge in excusing the jury from their duty of determining the guilt of accused from the evidence beyond a reasonable doubt, permitting said tribunal to speculate upon whether or not the punishment assessed in their verdict would be suspended, and intimating to that body that such would possibly or probably be the case, deprive an accused of his right to trial by jury as guaranteed by the Oklahoma Constitution, Art. II, Sec. 7, which said provision in its material part is:

"The right of trial by jury shall be and remain inviolate * * *"; and will a judgment based upon such a verdict deprive him of his liberty without due process of law, in violation of the 14th Amendment to the Constitution of the United States?

A second question is presented: Does the failure of the trial court to record any excuse or reason for failing to follow the recommendation of the jury, thereby preventing appellant from having the same reviewed by the Court of Criminal Appeals to determine whether or not this action constituted abuse of discretion, of itself operate to deprive appellant of his liberty without due process of law?

D.

To answer the first question intelligently involves a consideration and determination of the probable effect of the conduct of the trial judge as the same is reflected in the Opinion of the Court of Criminal Appeals, as it appears in the record (Tr. 38-44, App. i-ix).

To answer the second question with justice to appellant, it will be necessary to refer to the Opinion of the Court of Criminal Appeals, where it is said:

> "We are without the benefit of the trial court's findings as to previous good reputation, but as was in the *Presnell* case, *supra:*
>
> "Unless such investigation shows conduct on part of the defendant, which indicates that he is not eligible under the statute to receive a suspended sentence for the crime by him committed, this court is of the opinion that great weight should be attached to the recommendation of the jury" (Tr. 52, App. viii-ix).

Also, the Order denying Petition for Certiorari sheds some light upon the second question (Tr. 70-71).

Appellant raised the Federal questions that he was being deprived of his liberty without due process of law in violation of the 5th and 14th Amendments to the Constitution of the United States in his Petition for Rehearing (Tr. 53-57, App. ix-xi), and in his Application for Leave to File and Petition for Certiorari (Tr. 63-69, App. xii-xvi).

E.

Appellant contends that, in view of the statement hereinbefore set forth and supported by the record, the Federal question tendered is substantial and that the nature of the case and the rulings of the court are such as to bring the case within the cited statute and cases.

The facts recited in the Opinion of the Court of Criminal Appeals upon which appellant bases his appeal, as they appear at pages 47-50 of the Transcript and in the Appendix at pages ii-vii are as follows:

> "The Court: Let the record show that the bailiff orally informed the Court that the jury was asking to be advised by the Court as to whether or not they could recommend a suspended sentence.
>
> It is agreed that the communication from the jury to the bailiff and the passing of the statement from the bailiff to the Court in the manner in which it was done in this instance is not objected to and both parties agree that this procedure is proper for this case.
>
> (There followed an off-the-record discussion and at 2:20 p.m. the jury was called from the jury

room, assembled in the jury box, and the defendant, Court and counsel for all parties being present, the following proceedings occurred in open court:)

The Court: Now, Ladies and gentlemen of the Jury, I understand from the bailiff that you have a question that you want to ask the Court. The proper way to do it is to have you brought into the courtroom and have one of you write out the question on a sheet of paper and pass it back to the Court and I will then confer with the attorneys and make such answer as is proper.

(At this point a blank sheet of paper was handed to a juror who complied with the Court's request and the question as written was then passed to each of the other jurors, then returned to the Court. There then followed a discussion at the bench out of the hearing of the jury and court reporter.)

(The following statement was made into the record out of the hearing of the jury:)

The Court: Let the record show that the jury passed to the court, after the question had been passed to the balance of the members of the panel, the question as follows:

"Could jury make sentence if agreed to by jury, make the sentence a suspended sentence?"

It is agreed that the Court may orally advise the jury in effect that any language written on the verdict is surplusage and is in no way binding on the Court.

However, the Court desires them to understand that they are not precluded from writing anything they may desire on the verdict.

Is that agreeable, gentlemen?

Mr. Grayson: Yes.

Mr. Whelan: Yes.

(The following statement was made in the presence and hearing of the jury:)

The Court: Ladies and gentlemen, the question has been asked the Court, and I understand from observation that the balance of the members of the panel saw it.

'Could jury make sentence if agreed to by jury, make the sentence a suspended sentence?'.

That is the question that all of you wish to ask the Court, is that correct? You all are in agreement that that is the question?

(There was no dissenting expression from any juror.)

The Court: You are advised that any words written on the verdict by you are entirely surplusage and in no way binding on the Court and are not part of the verdict.

However, I want you to thoroughly understand, of course, that you are not precluded from writing whatever you may desire on the verdict, if you thoroughly understand the writing, if any, on the verdict, if the verdict is accepted by the Court, is not any way binding on the Court.

Now, do you all understand that?

(The jury responded in the affirmative.)

The Court: All right, you may retire to the jury room and further consider your verdict.

(At 4:45 p.m., the jury reported to the Court that they had arrived at a verdict, and they were assembled in the jury box, and the defendant,

Court and counsel for all parties present, the following proceedings were had in open court:)

The Court: Ladies and gentlemen of the jury, have you arrived at a verdict?

The Foreman: We have.

The Court: Will the Foreman hand me the verdict?

(The Foreman approached the Bench and complied with the request)

The Court: Now, as I previously explained to you, Ladies and Gentlemen—the verdict that I have been handed by the Foreman has certain writing on it and before I accept the verdict I want you to thoroughly understand as I think you do, when I explained it to you before, that the verdict, if it is received will be received by the Court and the writing that is on here, placed on here I presume by the Foreman, is surplusage and does not in any way constitute a part of the verdict: in other words, it is not your verdict; it is not binding on the Court. Now do you all understand that? And if you tell me you do and understand that in accepting it I accept it with this writing on here purely as surplusage in so far as the verdict itself is concerned and not binding on the Court as a matter of law, if you all understand that, I will accept the verdict.

Now, is there any misunderstanding about it?

The Foreman: (From his position immediately in front of the Bench:) The only way we could reach a decision was by writing that on there (Emphasis supplied).

The Court: That is not a proper way necessarily to arrive at the decision (Emphasis supplied).

As I previously told you all, you're free to make any writings or put any writings you want to on the verdict, but I want you to thoroughly understand, so there will be no misunderstanding about it, that anything you do put on it is, as I told you, not a part of it and is surplusage. With that understanding are you in accord about submitting the verdict to me.

The Foreman: Oh, yes.

(There was no expression of dissent from any member of the jury.)

The Court: The verdict will be received and the Clerk will read and record the verdict.

(At this time the Court Clerk read the verdict of the jury down to and including the typewritten portion thereof; then made the following statement:)

The Court Clerk: Now, this is the portion that has been written on the verdict by the jury.

The Court: All right, go ahead.

The Court Clerk: 'With the recommendation for a suspended sentence.'

The Court: Ladies and Gentlemen of the Jury, is that your verdict and the verdict of each and every one of you, subject to the explanation I have made to you?

(None of the members of the jury make any expression of dissent.)

The Court: All right. You are discharged from further consideration of this case and discharged until 9:00 o'clock in the morning."

The italicized colloquy between the judge and the jury marks this a "compromise" verdict beyond a doubt. The court could not have understood it otherwise, nor is there any doubt but what the jury, unlearned in legal terms and probably not understanding the word "surplusage", accepted the judge's permission to write whatever they pleased on the verdict as an implied promise upon his part to follow. It must be remembered that in the state court the jury have the right to fix the punishment, and this they attempted to exercise.

Following as it does, *Lively* v. *U. S.* (4th Cir.), 169 F.2d 386 (para. 13) and *Ryan* v. *U. S.*, 99 F.2d 373 (para. 15), *Demetree* v. *U. S.*, 207 F.2d 892, expresses the controlling principle as follows:

> "Our conclusion that the judgment should be reversed because of the error of the judge in inducing the verdict, notwithstanding the jury's stated inability to agree, by stating to them that the defendant could be put upon probation or fined, and his ready assurance, in answer to the jury's question as to his own attitude, in effect that he would be lenient, makes it unnecessary for us to consider in detail the grounds of error assigned in groups five and six."

O.S.A., Title 22, Sec. 914, is as follows:

> "A general verdict upon a plea of not guilty is either 'guilty', or 'not guilty', which imports a conviction or acquittal of the offense charged. * * *"

No provision is made in the Criminal Code for such discussions as occurred between judge and jury in this case.

It seems to be well settled that if a jury writes a request upon the verdict voluntarily and without suggestion, it may be treated as mere surplusage. If, on the other hand, the court intimates to the jury that they may go further than the Code justifies and include a request for leniency or a suspension of the sentence, this renders the judgment void. To establish this, I cite and quote the following cases from several states:

In *Williams* v. *State*, 220 P.2d 844, the Court said this:

> "There have been many cases before this court in which the jury by its verdict has fixed the penalty to be imposed upon the accused but at the same time there was included in the verdict a recommendation by the jury that the sentence be suspended during good behavior. In those cases the recommendation of the jury has been treated as surplusage and not a part of the verdict as such. *Estes* v. *State*, 35 Okl. Cr. 335, 250 P. 809; *Cole* v. *State*, 70 Okl. Cr. 444, 88 P.2d 671; *Knopp* v. *State*, 49 Okl. Cr. 416, 295 P. 228; *Teel* v. *State*, 53 Okl.Cr. 200, 11 P.2d 317, *Presnell* v. *State*, 71 Okl.Cr. 162, 109 P.2d 834.
>
> "In each of the above cases this Court stated that the verdict returned by the jury was improper but not prejudicial to the defendant and therefore not reversible error."

In *James* v. *State*, 139 P.2d 205, Judge Brett, speaking for the Court clearly marks the dividing line between a voluntary recommendation of this type and one induced by the Court, and I quote his language:

> "In the case of *State* v. *Matthews* (North Carolina), *supra* (191 N.C. 378, 131 S.E. 746), it is said:

"'After several hours of deliberation upon the evidence, under the instructions of the court as to the law applicable to the facts as they might find them to be, the jury had not agreed upon a verdict. Within a short time after receiving the instruction that they could return a verdict with a recommendation of mercy they returned the verdict upon which the judgment was rendered. It is manifest that this verdict was rendered pursuant to the instruction of his honor. The recommendation of mercy was not voluntary upon the party of the jury. * * *'

"We must hold that it is error for the court to instruct the jury either in the general charge, or in response to an inquiry made by the jury, that they may return a verdict with recommendation of mercy, or with other words having reference, necessarily, to the judgment to be rendered by the court, and that, where under the law there is no discretion vested in the court, as to the kind or amount of punishment which may be imposed by the judgment upon the defendant, the error is prejudicial to the defendant. If the jury returns a verdict voluntarily, including the words 'with recommendation of mercy', or words of similar import, these words may be disregarded as surplusage, if it clearly and definitely appears that the jury, upon a consideration of all the evidence, and under the instructions of the court, has agreed upon the verdict as returned by them."

In *Bowman* v. *State*, 167 P.2d 668, this occurs:

"'By the Court: Gentlemen, is there any question that comes up you think might be clarified? Any question you want to ask the court at this time? I don't know whether I can help.

"'Juror: Well, the question has come up as to whether it could be a suspended sentence given and a fine.

"'The Court: Of course, that's a matter the jury can't be concerned with at all. Under certain circumstances, the court can grant suspended sentences. The jury has no power. That is given entirely to the court, and I doubt whether it could be in this kind of case at all.

"'Mr. Counts: That's one of the things the jury should not consider.

"'Mr. Chamberlin: As I understand the law, this is one of the offenses excepted.

"'The Court: I don't like to discuss that before the jury because it is something they shouldn't consider. Gentlemen, you will be taken to supper, and come back as soon as you finish, within a reasonable time, and resume your deliberations.'.

"The fact that the jury, after this colloquy occurred, returned a verdict of guilty of manslaughter in the second degree with the punishment to be fixed by the court, lends some support to the theory that the court, unwittingly, by his remarks, led the jury to believe that the punishment might be suspended."

In *People* v. *Sherwood*, 3 N.E.2d 584, the Appellate Court of New York uses the following language:

"The jurors had been told by the district attorney in his summation that a grace of mercy by commutation rested in the Governor. That information, if it was to be given at all, should have been given by the court, with appropriate explanation. It is difficult to conceive of any case, however, where it would be either necessary or proper to instruct a jury on the point. Coming as it did, it amounted to nothing less than an invitation to possible doubting minds and uneasy consciences, to solve their doubts against the defendant.

and to salve their consciences with the thought that, if they were wrong, executive grace might cure the error. When, after long hours, the jury came into court, it may be that there was a desire to be given assurance by the court of what the district attorney had said. Or it may be that assurance was desired of a common popular impression that a jury may recommend mercy and thereby perhaps minimize and soften the penalty which the judge would otherwise impose. The impression is a mistaken one. Under the law of this state the penalty for murder in the first degree is death. No power or discretion is vested in any judge or court to vary it. Whatever the motive of the jury's request may have been, the answer of the court removed all doubt and hesitation. The answer was wrong. The 'law' expresses neither permission nor denial. Probably the law would regard an uninvited or voluntary recommendation as surplusage. We need not say. Here the jury was in effect invited to go beyond its province, and was erroneously told that the law permitted it to do so. The error almost certainly was prejudicial to the defendant. That being so, we need spend little time in an examination of cases in other jurisdictions which have dealt with more or less similar situations."

In *People* v. *Sherman*, 35 N.Y.S.2d 175, the New York Court said:

"However, in its charge to the jury, the trial court went beyond this and said: 'The matter of possible punishment is matter that rests entirely with the court. In other words, it is not for the jury to go into the jury room and say, "If we find the defendant guilty, what will he get? Would he get a suspended sentence? Would he get a day? What will he get? What sentence will the court impose?"'

"We find that the suggestion contained in the court's charge as to the possibility of suspension of sentence or the imposition of only a day in prison was improper. It may have conveyed to the jury the idea that the matter of conviction was of less importance because no imprisonment, or a very brief term of imprisonment, might be imposed by the court after a conviction. As was said in *People* v. *Santini*, 221 App. Div. 139, 142, 222 N.Y.S. 683, 686, affirmed, 246 N.Y. 612, 159 N.E. 672, it 'may have been accepted by the jury as tantamount to an invitation to convict the defendant in consideration of the court's implied promise to exercise lenience.' The statement which we have held objectionable was unnecessary in order to eradicate any possible error committed by defendant in referring to the possibility of a long term of imprisonment though we have no doubt that the court made the statement with that object in view."

In *People* v. *Warner*, 286 N.W. 812 (Mich.), I find support for my contention, and quote:

"I find reversible error.

"The record shows that the jury retired at 11:45 a.m. to consider the verdict, returned into court at 3:55 p.m. and received further instruction, returned again at 4:45 p.m. and received additional instruction, returned again at 11 p.m., and then the following occurred in the absence of defendant and his counsel:

"'The Court: Members of the jury, the question that you ask the court, the court will consider confidential. No one knows the contents of your question but you and myself, and the question will be filed with the clerk, then it becomes public property. The reason that I do not divulge the question at this time is because it would show the extent of your deliberations. The answer is "yes." You may retire.'

"Ten minutes later the jury returned a verdict of guilty, as charged, with recommendation of leniency. The record discloses that the question by the jury was as follows: 'The jury wants to know if a verdict may be accompanied by recommendation of leniency.'

"Defendant's assignment of error No. 15, is as follows: 'The court erred in receiving a message from the jury without making known the contents thereof to the defendant and his attorney, and in answering "yes" to said message now known and attached to bill of exceptions as a certified copy, without explaining the law to the jury that the court alone had the duty of sentencing any defendant.'

"In his brief counsel for defendant argue the point as follows: 'Our assignment No. 15, also points out what we feel to have been a grievous error, when the court received a message without making known its contents, but in answering "yes" to same, said message being what we now know to have been the question: "The jury wants to know if a verdict may be accompanied by a recommendation of leniency", this being set forth in the clerk's certified copy in the Record on page 132. Without the judge making this question known, and without explaining that the court alone had the responsibility of sentencing the defendant, it makes it look like a promise to them that leniency would be given. * * *'

"So the point is before us for consideration and determination.

"(2) An unauthorized recommendation to leniency does not render a verdict void for it may be treated as mere surplusage. But an authorized recommendation to leniency, quickly acted upon, discloses that the verdict was influenced thereby.

"Conceding that the jury had no right to consider the penalty emphasizes the fact that the penalty must have influenced the verdict when the jury were informed that their verdict might express their views in behalf of leniency without being instructed that the issue before them was to be decided regardless of consequent penalty to be imposed by the court under a verdict of guilty.".

On the second question, in the conclusion of the Opinion, JUDGE NIX, speaking for the Court of Criminal Appeals, said: "We are without the benefit of the trial court's finding as to previous good reputation" (Tr. 52, App. viii). The appellant's Application for Leave to File and Petition for Certiorari was an effort to correct this fallacy, for in *Townley* v. *State*, very recently and not yet officially reported except in Oklahoma Bar Journal at page 1472, the author of the *Hughes* opinion, speaking for the Court of Criminal Appeals, adopted as controlling in principle, *State* v. *Mitchell*, 77 Idaho 115, 289 P.2d 315. In the Idaho case, Mitchell appealed from the refusal of the trial judge to grant him probation, and in reversing the cause, that Court said:

"Appellant was entitled to have the court consider all these facts in exercising its discretion in the determination of whether the application of appellant for probation should be granted. It was error for the trial judge not to consider the same, and to base his refusal of appellant's application for probation solely upon the action of the jury. The trial court must exercise this judicial discretion in a lawful and legal manner. He must give consideration to the application and grant or deny the same in the exercise of a sound, legal discretion. The refusal of the application must not be

arbitrary and cannot be based upon mere whim or caprice nor upon any ground not sanctioned by law" (Tr. 65).

Thus it is manifest that an abuse of discretion upon the part of a trial court in the matter of failure to follow a jury's recommendation of a suspended sentence is reviewable and subject to correction on appeal.

It is fundamental that "due process of law" requires that each individual be accorded the same protection in law as granted all others. It is academic that an act of discretion (such as denying a continuance or denying a change of venue) is reviewable on appeal. So we see Townley granted a review of the trial judge's exercise of discretion in refusing him a suspended sentence, and the same court, speaking through the same judge, denying Hughes the same right of review by merely saying that the record was not before the court and refusing him certiorari to bring it there. In this particular, following the holding in the Idaho case, appellant was denied due process of law.

WHEREFORE, PREMISES CONSIDERED, appellant prays that this Honorable Court take jurisdiction hereof and herein and grant appellant all such relief as he is entitled to receive, including a reversal of the judgment.

SID WHITE,
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Oklahoma City, Oklahoma.
Attorney for Appellant.

December, 1959.

APPENDIX

EXHIBIT A

FILED
IN COURT OF CRIMINAL
APPEALS OF STATE OF
OKLAHOMA
May 13, 1959
Andy Payne, Clerk

IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF OKLAHOMA

Ray J. Hughes,
Plaintiff in Error

vs No. A-12,696

The State of Oklahoma,
Defendant in Error.

SYLLABUS

1. Where jury returns a verdict of guilty and endorses on the verdict, "with the recommendation for a suspended sentence", such recommendation is not a part of the verdict, and is a matter addressed to the sound judicial discretion of the trial judge as to whether he should follow the recommendation of the jury.

AN APPEAL FROM THE DISTRICT COURT OF CANADIAN COUNTY,
OKLAHOMA
HON. WILLIAM FOGG, JUDGE.

Ray J. Hughes was convicted of the crime of larceny of domestic animals and appeals.

AFFIRMED

Frank Grayson, Oklahoma City,
Attorney for Plaintiff in Error.
Mac Q. Williamson, Attorney General,
Sam H. Lattimore, Asst. Atty. Gen.,
Attorney for Defendant in Error.

[APPENDIX]

Nix, Judge:

Ray J. Hughes, hereinafter referred to as the defendant, was charged by information with the crime of larceny of domestic animals. He was tried before a jury who found the defendant guilty but was unable to agree upon the punishment and left the punishment to be assessed by the trial judge with recommendation for a suspended sentence. The defendant appeals by transcript to this court for reversal upon the contention that the trial court abused its discretion in refusing to follow the recommendation of the jury which was set out in their verdict recommending that the sentence be suspended.

Since this is an appeal by transcript, the court is without the benefit of the testimony received at the trial of the case. However, it is not necessary to detail the facts out of which the charge arose as the only question raised by the defendant is whether or not the trial court abused its discretion in ignoring the recommendation of the jury as to a suspended sentence. The transcript as to the proceedings reveals that the following discussion took place between the trial judge and the jury:

"The Court: Let the record show that the bailiff orally informed the court that the jury was asking to be advised by the court as to whether or not they could recommend a suspended sentence.

It is agreed that the communication from the jury to the bailiff and the passing of the statement from the bailiff to the court in the manner in which it was done in this instance is not objected to and both parties agree that this procedure is proper for this case.

(There followed an off-the-record discussion and at 2:20 p.m. the jury was called from the jury room, assembled in the jury box, and the de-

fendant, Court and counsel for all parties being present, the following proceedings occurred in open court:)

The Court: Now, Ladies and gentlemen of the Jury, I understand from the bailiff that you have a question that you want to ask the Court. The proper way to do it is to have you brought into the courtroom and have one of you write out the question on a sheet of paper and pass it back to the Court and I will then confer with the attorneys and make such answer as is proper.

(At this point a blank sheet of paper was handed to a juror who complied with the Court's request and the question as written was then passed to each of the other jurors, then returned to the Court. There then followed a discussion at the bench out of the hearing of the jury and court reporter.)

(The following statement was made into the record out of the hearing of the jury:)

The Court: Let the record show that the jury passed to the Court, after the question had been passed to the balance of the members of the panel, the question as follows:

'Could jury make sentence if agreed to by jury, make the sentence a suspended sentence?'

It is agreed that the court may orally advise the jury in effect that any language written on the verdict is surplusage and is in no way binding on the Court.

However, the Court desires them to understand that they are not precluded from writing anything they may desire on the verdict.

Is that agreeable, gentlemen?

Mr. Grayson: Yes.

Mr. Whelan: Yes.

(The following statement was made in the presence and hearing of the jury:)

The Court: Ladies and Gentlemen, the question has been asked the Court, and I understand from observation that the balance of the members of the panel saw it.

'Could jury make sentence if agreed to by jury, make the sentence a suspended sentence?'

That is the question that all of you wish to ask the court, is that correct? You all are in agreement that that is the question?

(There was no dissenting expression from any juror)

The Court: You are advised that any words written on the verdict by you are entirely surplusage and in no way binding on the Court and are not part of the verdict.

However, I want you to thoroughly understand, of course, that you are not precluded from writing whatever you may desire on the verdict, if you thoroughly understand the writing, if any, on the verdict, if the verdict is accepted by the Court, is not in any way binding on the Court.

Now do you all understand that?

(The jury responded in the affirmative.)

The Court: All right, you may retire to the jury room and further consider your verdict.

(At 4:45 p.m., the jury reported to the Court that they had arrived at a verdict, and they were assembled in the jury box, and the defendant, Court and counsel for all parties present, the following proceedings were had in open court:)

The Court: Ladies and Gentlemen of the Jury, have you arrived at a verdict?

The Foreman: We have.

The Court: Will the Foreman hand me the verdict?

(The Foreman approached the Bench and complied with the request.)

The Court: Now, as I previously explained to you, Ladies and Gentlemen—the verdict that I have been handed by the Foreman has certain writing on it and before I accept the verdict I want you to thoroughly understand, as I think you do, when I explained it to you before, that the verdict, if it is received will be received by the Court and the writing that is on here, placed on here I presume by the Foreman, is surplusage and does not in any way constitute a part of the verdict; in other words, it is not your verdict: it is not binding on the Court. Now do you all understand that? And, if you tell me you do and understand that in accepting it I accept it with this writing on here purely as surplusage in so far as the verdict itself is concerned and not binding on the Court as a matter of law, if you all understand that, I will accept the verdict.

Now, is there any misunderstanding about it?

The Foreman: (From his position immediately in front of the Bench:) The only way we could reach a decision was by writing that on there.

[APPENDIX]

The Court: That is not a proper way necessarily to arrive at the decision.

As I previously told you all, you are free to make any writings or put any writings you want to on the verdict, but I want you to thoroughly understand, so there will be no misunderstanding about it, that anything you do put on it is, as I told you, not a part of it and is surplusage. With that understanding are you in accord about submitting the verdict to me?

The Foreman: Oh, yes.

(There was no expression of dissent from any member of the jury.)

The Court: The verdict will be received and the Clerk will read and record the verdict.

(At this time the Court Clerk read the verdict of the jury down to and including the typewritten portion thereof; then made the following statement:)

The Court Clerk: Now, this is the portion that has been written on the verdict by the jury.

The Court: All right, go ahead.

The Court Clerk: 'With the recommendation for a suspended sentence.'

The Court: Ladies and Gentlemen of the Jury, is that your verdict and the verdict of each and every one of you, subject to the explanation I have made to you?

(None of the members of the jury make any expression of dissent.)

The Court: All right. You are discharged from further consideration of this case and discharged until 9:00 o'clock in the morning."

It is apparent from the foregoing discussion that the trial judge was not without experience in the matter as his advice to the jury was in line with previous decisions of this court in the case of *Presnell* v. *State*, 71 Okl. Cr. 162, 109 P2d 834, the court said:

> "Where the jury returns a verdict of guilty and endorses on the verdict 'We recommend a suspended sentence' such recommendation is not a part of the verdict and is a matter addressed to the sound discretion of the trial judge as to whether he should follow the recommendation of the jury."

For other cases treating the matter as surplusage, see *Williams* v. *State*, 92 Okl. Cr. 70, 83, 220 P2 836; *Knopp* v. *State*, 49 Okl Cr 416, 295 P 228; *Cole* v. *State*, 70 Okl Cr 109, 104 P2d 981; *Estes* v. *State*, 35 Okl Cr. 335, 250 P 809; *Taylor* v. *State*, 79 Okl Cr 115, 152 P2 123; *Severn* v. *State*, 72 Okl Cr 141, 114 P2 181; *Turrey* v. *State*, 95 Okl Cr 418, 247 P2 304.

The granting of a suspended sentence is regulated by statute and is wholly within the discretion of the trial court. The statute provides:

> "Whenever any person shall be convicted in any court of record for any crime other than murder, manslaughter or arson, the Judge trying said cause may, after sentence, suspend said judgment and sentence, and allow said person so convicted to be released upon his own recognizance. Said Judge may also suspend the judgment and sentence of a youth, twenty (20) years of age or under, who has been convicted in any court of record of the crime of arson. Provided, that no such person shall be so released, who, has not,

> prior thereto, borne a good reputation or who may have been prior thereto, convicted of a felony in any state or territory of the United States."

Under this statute the trial judge has the judicial discretion to determine whether the accused is eligible for a suspended sentence and whether the court, in the exercise of that discretion, chooses to suspend the sentence. It is said in the case *Ex parte: Boyd*, 73 Okl Cr 441, 122 P2 162:

> "Only those persons coming within terms of statute are eligible for suspended sentence, but they have no right to demand the same, and it may not be granted to them except at the discretion of the court."

Also see *Ex parte Ollie Banks*, 74 Okl. Cr. 1, 4.

From a review of the reported discussion with the jury, as to their right to recommend a suspended sentence, it is clear that the trial judge made no statement, commitment, or promise that could have possibly misled or confused the jury. He was positive in his statements that it would in no manner be binding upon him. He made it clear that it would only be surplusage and did not constitute a part of the verdict.

The record reflects no promise even to consider the recommendation and he refused to accept the verdict until the jury was thoroughly advised as to these facts and assented thereto. The court is not in a position to say what they would have done had they been in the trial judge's place. The instructions indicate that the good character and previous good reputation was testified to and evidently stood unrefuted. However, the matter was addressed to the sound discretion of the trial judge. We are without the benefit of the trial court's findings as to previous good reputation, but as was said in the *Presnell* case *supra*:

> "Unless such investigation shows conduct on part of the defendant, which indicates that he is not eligible

under the statute to receive a suspended sentence for the crime by him committed, this court is of the opinion that great weight should be attached to the recommendation of the jury."

However, the trial court was within his rights in ignoring the recommendation of the twelve jurors and this court will not interfere.

The judgment and sentence of the trial court is therefore affirmed.

Powell, P.J., and Brett, J., concur

EXHIBIT B

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

RAY J. HUGHES, Plaintiff in Error,)
-vs-) No. A-12,696
THE STATE OF OKLAHOMA, Defendant in Error.)

PETITION FOR REHEARING AND FOR AN EXTENSION OF TIME WITHIN WHICH TO SUPPLEMENT AND BRIEF THE SAME

"THE ADMINISTRATION OF JUSTICE MUST BE FREE FROM DOUBT"

Carter v. State, 292 Pac. (2d) 435

Comes now the plaintiff in error showing to the court:

That this was an appeal by transcript and not by case-made.

That this case is unique in Oklahoma Juris Prudence in that here a trial judge encouraged or permitted a jury to recommend in their verdict a suspension of the punish-

ment there assessed; said judge being advised at the time by the foreman of the jury "The only way we could reach a decision was by writing that on there."

That Sec. 914 of Title 22 O.S.A., a part of Oklahoma Code of Criminal Procedure, provides definitely the form of a verdict in a criminal case as follows, to-wit:

> "A general verdict upon a plea of not guilty, is either 'guilty', or 'not guilty', which imports a conviction or acquittal of the offense charged. Upon a plea of a former conviction or acquittal of the same offense, it is either 'for the State', or 'for the defendant.' When the defendant is acquitted on the ground that he was insane at the time of the commission of the act charged, the verdict must be 'not guilty by reason of insanity.' When the defendant is acquitted on the ground of variance between the charge and the proof, the verdict must be 'not guilty by reason of variance between charge and proof.' "

That the language and conduct of the trial judge in so encouraging and permitting a deviation or variance from the form of verdict fixed by law could have been misunderstood or interpreted by the jury as intimating a disposition or inclination to follow the same.

That assuming the jury were advised of this honorable court's holding in *Presnell* v. *State*, 71 OKL. CR. 162, they must have understood the trial judge's language to be an intimation upon his part that he would follow the same because there it is said:

> "Unless such investigation shows conduct on part of the defendant, which indicates that he is not eligible under the statute to receive a suspended sentence for the crime by him committed, this court is of the opinion that great weight should be attached to the recommendation of the jury."

That so to permit the judge to persuade a jury to return a verdict of guilty violates due-process of law as set forth in the Constitution of Oklahoma and as set forth in the Constitution of the United States, particularly in the 5th and 15th amendments to said last named instrument and amounts to depriving plaintiff in error of his liberty without due-process of law as so guaranteed.

That the law tolerates no interference with the jury in a criminal case or persuasion by the trial court of its verdict.

That because the question is novel and the presidence if any are limited, the matter is difficult to brief and properly present.

That plaintiff in error has and had no previous criminal record and was and is in all things eligible for a suspended sentence.

That plaintiff in error, with the aid of his friends, was only able to employ Sid White on the afternoon of Friday the 22nd inst.

WHEREFORE, plaintiff in error prays that he be granted thirty (30) days within which to brief this matter and to supplement this his petition for rehearing upon the matters hereinbefore set forth or others that may be indicated by research and investigation.

_____

Attorney for Plaintiff in Error

A copy mailed to the Attorney General on this 25th day of May, 1959.

_____

S. W.

EXHIBIT C

IN THE COURT OF CRIMINAL APPEALS WITHIN AND FOR THE STATE OF OKLAHOMA

Ray J. Hughes,	)	
Plaintiff in Error,	)	
-vs-	)	No. A-12,696
State of Oklahoma,	)	
Defendant in Error.	)	

APPLICATION FOR LEAVE TO FILE AND PETITION FOR CERTIORARI

Comes now the plaintiff in error, showing to the Court:

That heretofore he was convicted in the District Court of Canadian County upon a charge of larceny of domestic animals, his punishment fixed by the jury at three years in the penitentiary with a recommendation that said sentence be suspended, all of which, and much more, is known to the Court with reference to the return and acceptance of said verdict.

That the Honorable Wm. L. Fogg, Judge of said court, ignored or gave no heed to said recommendation of the jury, but sentenced this plaintiff in error to serve a term of three years in the state penitentiary at McAlester, Oklahoma.

Now, the framers of our Constitution, jealous that every man should have justice, wrote and the people adopted Article II, Section 6, which is as follows:

> "The courts of justice of the State shall be open to every person, and speedy and certain remedy afforded for every wrong and for every injury to person, property or reputation; and right and justice shall be administered without sale, denial, delay or prejudice."

That in 1926 a Grand Jury in Okmulgee County, Oklahoma, returned a presentment against Judge W. A. Barnett and the other democratic officials of said county; that thereupon, immediately the Honorable James Hepburn, District Judge of said county, suspended said officers from office.

That no provision was made by statute for an appeal of such action, but because of said Constitutional provision and because of common law practice and usage, the Supreme Court of the State of Oklahoma decided that certiorari would lie, issued the writ and vacated the orders of suspension.

That recently, in the case of *Townley* v. *State*, the Journal, Vol. 30 Number 33, Page 1473 (October 3, 1959 issue), this Court took a long stride to render each man convicted of crime equal before the law as required by the Constitutions of state and nation, and said, in substance, that since a suspended sentence was available to some it must be available to all under the same or similar circumstances, that no discrimination could be made and no denial be had except for one of the reasons set forth in the statute.

That the author of *Townley* v. *State* rested his reasoning heavily upon *State* v. *Mitchell*, 77 Idaho 115, 289 P2 315, and his quotation therefrom is as follows:

> "Appellant was entitled to have the court consider all these facts in exercising its discretion in the determination of whether the application of appellant for probation should be granted. It was error for the trial judge not to consider the same, and to base his refusal of appellant's application for probation solely upon the action of the jury. The trial court must exercise this judicial discretion in a lawful and legal manner. He must give consideration to the application and grant or deny the same in the exercise of a sound, legal discretion. The refusal of the application must

not be arbitrary and cannot be based upon mere whim or caprice nor upon any ground not sanctioned by law."

That tho it does not so appear from said quotation, the facts are that Mitchell was denied suspension of sentence by the trial court and appealed, contending that proper consideration was not given to his rights in the premises and that such denial amounted to depriving him of equal protection of the law; his appeal was sustained, and the cause reversed with directions.

That this Court has long been committed to the idea that the granting or refusing of a suspension of sentence was an act of judicial discretion, but has never heretofore recognized in any of its opinions that all acts of judicial discretion in derogation of personal or property rights are reviewable.

That judicial discretion does not mean the whim, caprice or personal opinion of the officer assuming to exercise it, and its abuse may be corrected by mandamus is well decided in *Fletcher, Attorney General, et al* v. *District Court of Jefferson County, et al*, 328 N.W. 290, 80 A.L.R., page 340, where the Supreme Court of Iowa said:

"The 'abuse of discretion', for which the act of an inferior court will be set aside on certiorari, does not imply a bad motive, or a wrongful purpose of perversity, passion, prejudice, partiality, moral delinquency, willful mis-conduct, or intentional wrong; but if the reasons given by the court for its action are clearly untenable or unreasonable, if its action clearly amounts to a denial of justice, if clearly against justice or conscience, reason and evidence, it has abused it discretion.

"And again in Syllabus 6 this language is used:

"The discretion of the court with the exercise of which a reviewing court will not interfere does not mean the arbitrary will or merely individual or personal view of the judge."

That in Oklahoma a jury fixes the punishment under ordinary circumstances, and its recommendation that the sentence be suspended (particularly where the record shows, as here, that but for said recommendation no verdict could have been agreed upon), and therefore this Court, in affirming the conviction of your plaintiff in error rightfully said that said recommendation was entitled to the highest probative force and could not have been lawfully denied except upon a finding that the plaintiff in error was ineligible therefor by statute.

That in affirming said sentence, this Court said that it did not know why the judge refused a suspension of sentence, under the circumstances.

That such an answer does not satisfy due process of law as commanded by the Constitution of Oklahoma, the Constitution of the United States, and more particularly the XIV Amendment thereto, because by virtue thereof every prisoner is entitled to know the reason for his imprisonment.

That due process of law requires that all legal proceedings be memorialized in writing and that records thereof be kept in the office of the clerk of the court rendering the judgment; which includes the duty upon the part of the trial judge to set forth and have so recorded his reasons for denying the recommendation of the jury in this case to the end that the judges may see whether or not he abused his discretion in so doing.

That to permit the judge to ignore and disregard such a recommendation without giving in writing his reasons therefor and filing the same with the court clerk is to revert to the star chamber proceedings, to deprive plaintiff in error of his right to have reviewed and determined

whether or not said recommendation was denied capriciously or arbitrarily or for what other reasons.

That since it is well established in this jurisdiction that to satisfy the command of the Constitution certiorari will avail where no appeal has been provided by statute, that therefor the Constitution of the United States commands that no state deprive a citizen of his liberty without due process of law, and the Constitution of Oklahoma in the same particular alike requires that said question be determined and the validity of the trial judge's denial of said recommendation tested and determined.

That plaintiff in error is and was at the time of the rendition of said verdict in all things eligible under the statute to receive a suspended sentence.

WHEREFORE, PREMISES CONSIDERED, plaintiff in error prays:

That the rule to show cause, or alternative, writ of certiorari, carry, and issue to the Clerk of the District Court of Canadian County commanding said officer to forthwith transmit to this Court the record made by the judge upon his denial of the recommendation of the jury that the sentence fixed in their verdict be suspended.

That upon final hearing the judge be ordered and directed to suspend said sentence in accordance with said recommendation.

That he have all such other and further relief as he is entitled to receive.

Sid White
Attorney for Plaintiff in Error

A true and correct copy of the above and foregoing was mailed to the Attorney General, State Capitol, Oklahoma City, Oklahoma, this 14th day of October, 1959.

EXHIBIT D

FILED
In Court of Criminal Appeals
State of Oklahoma
OCT 20 1959
ANDY PAYNE
Clerk

IN THE COURT OF CRIMINAL APPEALS,
STATE OF OKLAHOMA

Ray J. Hughes,	)	
Plaintiff in Error,	)	
vs	)	No. A-12,696
The State of Oklahoma,	)	
Defendant in Error.	)	

ORDER DENYING PETITION FOR CERTIORARI

Now on this 19th day of October, 1959 the above matter coming on for hearing in conference, wherein defendant prays for issuance of "rule to show cause, or alternative writ of certiorari, carry, and issue to the clerk of the district court of Canadian County commanding him, said officer, to forthwith transmit to this Court the record made by the judge upon his denial of the recommendation of the jury that the sentence fixed in their verdict be suspended"; and "that upon final hearing the judge be ordered and directed to suspend the sentence in accordance with said recommendation."

This Court reviewing the record finds the following to be the sequence of events since the case was affirmed by this Court on May 13, 1959:

May 13, 1959 Opinion, judgment and sentence affirmed.

May 25, 1959 Petition for rehearing.

[APPENDIX]

May 26, 1959	Order allowing plaintiff in error 20 days from May 28, 1959 to file supplemental petition for rehearing.
June 18, 1959	Brief in support of petition for rehearing.
June 24, 1959	Response to brief in support of petition for rehearing.
June 25, 1959	Application of plaintiff in error to file petition in error amended to confrom to record.
July 16, 1959	Reply of plaintiff in error to defendant's response to brief in support of petition for rehearing.
July 16, 1959	Brief in support of petition for rehearing.
July 22, 1959	Order, Powell, P.J., Petition for rehearing denied.
July 23, 1959	Order, Powell, P.J., Plaintiff in error given 30 days to perfect appeal to Supreme Court, U.S. Mandate stayed 30 days.
July 29, 1959	Order, Powell, P.J., directing Clerk to issue mandate if case not appealed to Supreme Court U.S. by August 24, 1959.
Aug. 17, 1959	Notice of appeal (By Plaintiff in Error).
Aug. 18, 1959	Order, Nix, J., mandate stayed until October 21, 1959.
Oct. 15, 1959	Application for leave to file and petition for certiorari.

It is the opinion of the Court that the matters now attempted to be raised could have been raised months ago.

This Court, in furtherance of justice, where extinuating circumstances are found in the record and the Court fails to grant a suspended sentence, has often times used its power to modify the sentence imposed by the jury or the Court. However, in the within case we found nothing in the record to impel us to modify, and we could not modify for the reason that the jury imposed the minimum sentence. It could have been ten years, but was fixed at three years. 21 O.S. 1951 §1716.

This Court has no authority to order a court to suspend a sentence unless it embarks into the legislative field. The statute covering the matter is Title 22, O. S. 1951 §991, and it is annotated, setting out a long line of cases each to the effect that the granting or revoking of a suspended sentence is discretionary with the trial court, and that the Court of Criminal Appeals will not interfere with the exercise of that discretion.

Accordingly, the writ prayed for is denied. Time for seeking certiorari to the Supreme Court of the United States is further extended to the 26th day of October, 1959.

John C. Powell, Presiding Judge

Attest:

Clerk.